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bargaining units separate from those of the rank-and-file workers[34] so hinder the employer in operating his business and place him at such disadvantage at the bargaining table that the employees should be denied the right to organize by judicial decree even though the NLRA has never explicitly denied them that right? The answer to this question is at best a matter of opinion. However, it was precisely for deciding this type of question that Congress established a special agency that, through its constant contact with industry and the problems of interpreting the labor statutes, could develop the expertise needed to resolve these issues.[35] Nevertheless, the Board's response has been rejected and the responsibility for providing these employees the protection of the NLRA lies now with Congress.

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Public Utilities—State Action and Informal Due Process After Jackson

For nearly a century those who would impose constitutional limitations on ostensibly private conduct have been grappling with the elusive concept of "state action."[1] Indeed, the problem of defining state action in the troublesome no man's land between purely private and purely governmental conduct has been called the most important problem in American law.[2] In *Jackson v. Metropolitan Edison Co.*[3] the United States Supreme Court found the essential state action requirement lacking in a customer's attempt to impose due process limitations on the termination procedure of a privately owned utility company.[4]

34. Separate units for guards and professional employees have been authorized since 1947. 29 U.S.C. § 159(b) (1970).

35. *See* NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944).

1. In the Civil Rights Cases, 109 U.S. 3, 11 (1883) the United States Supreme Court first propounded the essential dichotomy between state action, which is subject to constitutional restraints, and "individual invasion of individual rights," which is not. The distinction for fourteenth amendment purposes is based on the proscription that "[n]o State shall make or enforce any law . . . ." U.S. CONST. amend. XIV, § 1.

2. *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

3. 95 S. Ct. 449 (1974).

4. Lower courts had been sharply divided in applying the state action doctrine to utilities which were privately owned, but subject to extensive and detailed regulation by the state. *Compare* Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973); Ihrke

Having resolved this threshold question in favor of the utility, the Court did not reach further issues pertaining to the nature of the property right involved, or what due process would require if there were state action for fourteenth amendment purposes.[5]

In October 1971 Metropolitan Edison, the sole supplier of electricity to much of the York, Pennsylvania, area, terminated its service to Catherine Jackson for alleged non-payment of bills.[6] Mrs. Jackson disputed that her utility account was in arrears, contending that she never received a bill for the period of the alleged delinquency. Upon the discontinuance of her electrical service without prior notice, she filed suit under section 1983 of the Civil Rights Act[7] seeking reinstatement of her utility service until she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. She claimed a statutory right to reasonably continuous electrical service,[8] alleging that Metropolitan's termination of her service constituted state action depriving her of property without due process of law.

In seeking to establish the requisite state action, the petitioner relied upon three major arguments: (1) Metropolitan's actions could have been attributed to the State because of the State's grant of monopoly status to the company;[9] (2) the state action stemmed from the

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v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972), *with* Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972) *and* Kadlec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir. 1969).

5. 95 S. Ct. at 452 n.2.

6. Metropolitan operates pursuant to extensive regulations filed with the Pennsylvania Public Utilities Commission and is the holder of a "certificate of public convenience" from the Commission. The issuance of such a certificate is a prerequisite for engaging in the utility business in Pennsylvania. *See* PA. STAT. ANN. tit. 66, § 1121 (1959). Under its regulations filed with the Pennsylvania Public Utilities Commission, Metropolitan Edison is permitted to discontinue service for nonpayment of bills, upon reasonable notice to the delinquent customer. *See* 95 S. Ct. at 451.

7. 42 U.S.C. § 1983 (1970) provides for a civil action for "deprivation of any rights, privileges, or immunities secured by the Constitution and the laws." The person causing this deprivation must be acting "under color of any statute, ordinance, regulation, custom, or usage of any State . . . ." This language has been equated by the Supreme Court for all practical purposes with the state action standard of the Civil Rights Cases, 109 U.S. 3 (1883). *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966).

8. PA. STAT. ANN. tit. 66, § 1171 (1959) provides in part: "Every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities . . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay."

9. The theoretical basis for this argument is that the state, by its acquiescence in, if not direct conferral of, monopoly power upon a public utility, greatly increases the efficacy of the utility's termination procedures. The customer knows that the utility threatening to terminate his service is his only possible source of electrical power. Likewise, the utility has little incentive as a monopolist to cultivate the good will of custo-

essential nature of the service rendered, giving it the character of a "public function";[10] (3) the service termination was state action because Metropolitan's regulations dealing with termination procedures were filed with, and approved by, the state regulatory agency.[11]

The six-member majority found none of these contentions persuasive. Analyzing each argument separately,[12] the Court held that there was an insufficient relationship between the alleged grant of monopoly status[13] and the challenged termination to justify labeling that termination "state action." Taking the narrow view that a "public function" must be an obligation imposed upon the state by statute,[14] the majority rejected the petitioner's second argument on the ground that the Pennsylvania statute imposed an obligation to furnish service only on the

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mers by eschewing high-handed termination procedures. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 671 (1974); Note, *Fourteenth Amendment Due Process in Terminations of Utility Service for Nonpayment*, 86 HARV. L. REV. 1477, 1487 (1973); *cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972); Lavoie v. Bigwood, 457 F.2d 7, 14-15 (1st Cir. 1972).

10. Private activity has been deemed state action when it involves itself in the public domain to the extent that it can be considered "quasi-municipal" in nature, thus giving the public an overriding interest in its regulation. *See* Evans v. Newton, 382 U.S. 296, 301-02 (1966) (privately owned park); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 378 (1963). *Compare* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), *with* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

11. *See* note 6 *supra*.

12. Justice Douglas, in his dissenting opinion, pointed to the necessity of analyzing all the relevant factors in their aggregate in a state action determination, rather than approaching the problem with the idea of finding any single factor that will suffice to establish state action. *See* 95 S. Ct. at 458; Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

13. The majority assumed arguendo that such a monopoly status had in fact been conferred by the State. At the same time, it was emphasized that Metropolitan's regulations did not actually contain an outright grant or guarantee of monopoly status, but rather that the utility business is a natural monopoly, caused by the industry's high fixed costs and significant economies of scale. *See* 95 S. Ct. at 454 n.8. The significance accorded this fact seems to be that even without regulation by the State, Metropolitan would have been a "natural" monopolist anyway and that therefore a causal relationship between the State's involvement and Metropolitan's monopolistic behavior was lacking. This approach overlooks the fact that the State, by regulating rates, removed any possible incentive to competitors who wished to enter the market despite the high initial investment, in hope of obtaining high profit margins. *See id.* at 461-62 (Marshall, J., dissenting). More importantly, it overlooks the State's removal of *legal* barriers to Metropolitan's monopoly status. *See* Note, 86 HARV. L. REV., *supra* note 9, at 1489. Ironically, utilities have succeeded in removing themselves from the prohibitions of the federal antitrust laws on the ground that they perform state action. *See* Gas Light Co. v. Georgia Power Co., 440 F.2d 1135, 1138-40 (5th Cir. 1971).

14. *See* 95 S. Ct. at 454. "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty . . . our case would be quite a different one." *Id.*

licensed utility, not on the state.[15] Finally, the majority adopted a standard of unprecedented rigidity in disposing of the petitioner's third contention. State approval of Metropolitan's termination procedure "where the Commission has not put its own weight on the side of the proposed practice by *ordering it*"[16] did not place the stamp of state action on a practice initiated by the private utility, where the role of the State was initially passive. What the majority innocuously perceived was a "heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory . . . that . . . elected to terminate service to petitioner in a manner which the Pennsylvania Public Utilities Commission found permissible under state law."[17]

Much of the case law and literature on the subject of state action has applied that doctrine to cases in which the challenged activity involved racial discrimination.[18] More recently, however, individuals have been seeking constitutional vindication of an expansive array of offended "rights" under the rubric of state action.[19] Decisions have tended to define three broad categories in which the indicia of government involvement in private activity have been sufficient to sustain a finding of "state action."[20] These are judicial enforcement of the challenged activity,[21] "joint participation" by a governmental agency in that

15. That the utility, and not the State, is required by statute to provide electrical services in no way detracts from the essentially public nature of the service. The State made a conscious decision to permit private companies, under a regulatory regime imposed by the State, to provide utility services. It seems clear that the alternative, adopted in municipalities across the nation, is for state or local governments to provide those essential services themselves. *See* 95 S. Ct. at 464 (Marshall, J., dissenting); 1963 MOODY'S PUBLIC UTILITY MANUAL a86.

16. 95 S. Ct. at 456-57 (emphasis added).

17. *Id.*

18. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1947); Williams, *supra* note 10.

19. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (first amendment challenge against advertising policy of broadcast licensee); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (first amendment challenges against solicitation rules of private shopping centers); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973) (challenge to law school examination procedure); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (challenge to private school disciplinary proceedings); cases cited note 4 *supra.*

20. *See generally* Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

21. *See* Shelley v. Kraemer, 334 U.S. 1 (1947) (judicial enforcement of a racially restrictive covenant held to constitute "state action"). *But cf.* Evans v. Abney, 396 U.S. 435 (1970).

activity,[22] and cases in which the state involvement stems from the essentially public nature of the entity performing the challenged activity.[23] These latter two categories are most pertinent to the public utility case presently under consideration.

In the leading case of *Burton v. Wilmington Parking Authority*[24] the United States Supreme Court held that a privately owned restaurant practicing racial discrimination had a sufficiently close relationship to the State of Delaware to characterize that discrimination as "state action." The building in which the restaurant was located was owned by a state agency and public funds were expended for its maintenance. Most significantly, a state-owned parking garage in the same building benefited from the presence of the restaurant, and the restaurant benefited from the presence of adjacent parking facilities. The Court held that "[t]he State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity . . . ."[25]

In *Public Utilities Commission v. Pollack*[26] passengers on a privately owned, but publicly regulated, bus sytem in Washington, D.C. alleged that the federal government violated plaintiffs' first and fifth amendment rights by forcing them to listen to piped-in radio programs while riding the system's buses. The Supreme Court found "state action" present not because of the overall regulatory scheme, but because in this case the Public Utilities Commission had initiated an investigation into the radio programs and had affirmatively sanctioned them on public interest grounds.[27]

In the recent case of *CBS v. Democratic National Committee*[28] the Court was again faced with a pervasive regulatory regime, instituted by the government as licensor of the public airwaves. CBS, the licensee, followed a policy of not accepting editorial advertising. Despite

22. *Compare* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Public Util. Comm'n v. Pollack, 343 U.S. 451 (1952); Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), *with* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) *and* Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

23. *See* Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946). *Compare* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), *with* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

24. 365 U.S. 715 (1961).

25. *Id.* at 725.

26. 343 U.S. 451 (1952).

27. *See id.* at 462.

28. 412 U.S. 94 (1973).

the existence of sweeping governmental regulation, the Court declined to find state action present in the CBS advertising policy, since the relationship of mutual benefit found to be significant in *Burton* was missing, as was the specific endorsement of the licensee's practice that formed the basis of the *Pollack* decision.[29]

A fourth "joint participant" case deserving of mention is *Moose Lodge No. 107 v. Irvis.*[30] *Moose Lodge* involved a claim that the issuance of a liquor license[31] to a racially discriminatory private club by the State of Pennsylvania constituted a denial of equal protection to a black person who had been refused service. The Supreme Court stated that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' "[32] to warrant a finding of state action. Noting that the state had not approved, encouraged, or initiated the discrimination, the Court held that it was insufficiently connected with the specific activity complained of. Again, the elements of the "symbiotic relationship" that characterized *Burton* were found lacking.[33]

Moose Lodge recognized the relevance of the state-imposed monopoly as a relevant factor in a state action determination, noting that Pennsylvania limited the number of liquor licenses that it would issue. Significantly, the Moose Lodge's monopoly was found to be only of limited effect—hence insufficient to qualify the State as a "joint participant."[34]

The second set of state action cases relevant to the public utility problem are characterized as the "public function" cases. In *Marsh v. Alabama*[35] an individual was arrested under a trespass ordinance, on the streets of a company town, for passing out religious literature against the wishes of the company's management. Notwithstanding the private ownership of the town, the United States Supreme Court found "state action" in contravention of the first amendment, stating, "the more an owner, for his advantage, opens up his property for use

29. Moreover, the first amendment protection enjoyed by CBS made the Court hesitant to set a precedent that could lead to the imposition of a broad range of constitutional obligations on broadcast licensees. *See id.* at 120-21; text accompanying notes 52-54 *infra.*

30. 407 U.S. 163 (1972).

31. The state imposed a ceiling on the total number of licenses that would be issued, along with detailed regulations governing the acquisition of a license.

32. 407 U.S. at 173, *quoting* Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

33. *Id.* at 175.

34. *See id.* at 177; Note, 74 COLUM. L. REV., *supra* note 9, at 670.

35. 326 U.S. 501 (1946).

by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[36]

The rationale of *Marsh* was extended in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*[37] *Logan Valley* involved an attempt by the owners of a shopping center to prohibit peaceful picketing of a business enterprise because it constituted an unconsented to invasion of property rights. Equating a shopping center to the company town's business district encountered in *Marsh*, the Supreme Court held that the State's trespass laws could not be used to exclude those wishing to exercise first amendment rights from property open to the public. The decision was carefully limited, however, to instances in which those rights were being exercised "in a manner and for a purpose generally consonant with the use to which the property is actually put."[38] As in *Marsh*, a factor weighing heavily with the Court was the important nature of the constitutional right being restricted, as compared to the apparent lack of any serious deprivation of privacy or property interests vested in the shopping center's owners.[39]

The "balancing of interests" approach suggested in *Marsh* and *Logan Valley* led to a different result, however, in *Lloyd Corp. v. Tanner*[40]—another case involving a private shopping mall. In *Lloyd*, handbillers inside the shopping mall distributed anti-Vietnam War literature—a task unrelated to the economic business of the mall. The Supreme Court thus faced the issue it expressly did not address in *Logan Valley*. This time the decision fell on the side of private property rights. Whereas the picketers in *Logan Valley* had to be near the store for their picketing to be effective, these handbillers had reasonable alternatives available in distributing their literature; there was no necessity to carry on their activity in the mall. To impose first amendment constraints on the mall owners would diminish property rights without significantly enhancing free speech rights.[41]

If the language in *Jackson* is taken literally, the case seems to be

36. *Id.* at 506; *accord*, Evans v. Newton, 382 U.S. 296 (1966) (segregated park). The Court in *Marsh* was also mindful of the preferred position occupied by those wishing to exercise first amendment freedoms, as opposed to the less advantageously positioned property rights of the owners of the town. *See* 326 U.S. at 509; text accompanying notes 52-54 *infra*.

37. 391 U.S. 308 (1968).

38. *Id.* at 319-20.

39. *See id.* at 324.

40. 407 U.S. 551 (1972).

41. *See id.* at 564-67.

a departure from previous holdings in certain important respects. The essence of the prior "public function" cases such as *Marsh, Lloyd,* and *Logan Valley* is that a private group may attain a close enough relationship to the public that constitutional interests of members of the public outweigh the private interests of property owners in restricting the use of their property.[42] Thus a balancing process is at work between competing legitimate interests: a finding of state action may protect constitutionally guaranteed freedoms of speech and religion as in *Marsh,* but it also may subject one who is a private property owner to constitutional limitations in the use of his property.[43]

While *Jackson* is not inconsistent with prior cases in its requirement that a private entity exercise powers "traditionally associated with sovereignty"[44] to perform a "public function," it does formulate new doctrine by requiring that those privately exercised powers be imposed upon the state by statute.[45] In neither *Marsh* nor *Logan Valley* does it appear that state statutory obligations were being privately performed —it was sufficient that a private entity was in control of the sole means of access to a town's business district, either through ownership of the streets themselves or their functional equivalents—a control clearly associated with sovereignty.[46] One could easily conclude that a privately owned utility also provides services "associated with sovereignty,"[47] since such services are governmentally provided when they are not privately supplied under government regulation.[48]

Furthermore, prior to *Jackson,* no court analyzing an interrelationship between a regulated or licensed private entity and a state regulatory agency had ever implied that, for private action to be attributable to the state, the state would actually have had to *order* that action. In *Pollack,* it was sufficient that a state agency approved the practice after

42. *See* Note, 60 VA. L. REV., *supra* note 20, at 851-54; *cf.* Williams, *supra* note 10, at 378.

43. *Cf.* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

44. *See* 95 S. Ct. at 454.

45. *Id.*

46. *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where it was found that there were no overriding public interests in permitting handbilling in a shopping mall when reasonable alternatives on public property were available.

47. *Accord,* Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973).

48. In North Carolina, based on the 1960 census, sixteen communities of ten thousand population and over supplied electric utility services municipally, while five privately owned companies served the rest of the state. 1963 MOODY'S PUBLIC UTILITY MANUAL a86, a98.

the fact. Likewise in *Burton*, the Parking Authority never ordered the Eagle Restaurant to engage in racial discrimination. The Court in *CBS* emphasized that the Federal Communications Commission did not *foster* or *encourage* the challenged conduct, and in *Moose Lodge* it spoke in terms of "significant involvement" by the state. Thus, unless its result is based on unarticulated considerations, *Jackson* may signify a substantial retreat from prior state action decisions.

To Justice Marshall, the most troubling aspect of the majority's opinion was that, if Metropolitan's termination does not involve state action for due process purposes, presumably, if the utility decided not to serve minorities, it also would not involve state action[49]—the underlying constitutional claims would be irrelevant to the state action determination. Yet it seems almost inconceivable that the Supreme Court would countenance racial discrimination on the part of a state-regulated and protected monopoly, dispensing a necessity of modern life.[50] There is a strong probability, then, as Justice Marshall himself seemed to recognize, that unspoken factors lay at the root of the Court's narrow interpretation of state action in this case.[51] State action may be but a shorthand phrase, obscuring a far more sophisticated analysis than merely looking for a sufficient quantum of state involvement in what appears to be private conduct.[52] The underlying question is not whether there is "state action," but whether there is "state action" that violates constitutional rights, for counterbalanced against one person's claim that he has been discriminated against or denied due process is another person's asserted right to discriminate, or to use his property as he sees fit.[53] In cases discussed previously, the prevailing interests were freedom of speech and religion in *Marsh*, freedom of speech in *Logan Valley*, property rights in *Lloyd* (where free speech interests

49. 95 S. Ct. at 465 (Marshall, J., dissenting). Lower courts, however, have explicitly recognized that different standards of finding "state action" may apply, depending on the importance of the alleged deprivation. *See, e.g.*, Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

50. *See* Williams, *supra* note 10, at 365-66.

51. Marshall's dissent on two occasions mentions what some of these unspoken considerations may be. He cites the value of preserving a private sector of individual choice, free of constitutional restraints, and the administrative burdens that a due process requirement could impose on utilities. *See* 95 S. Ct. at 464. *See also* Note, 74 COLUM. L. REV., *supra* note 9, at 662; Note, 60 VA. L. REV., *supra* note 20.

52. *See* Note, 60 VA. L. REV., *supra* note 20; *cf.* Black, *supra* note 2, at 100-03; Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 487 (1962); Williams, *supra* note 10, at 389-90. *See generally* Note, *Gilmore v. City of Montgomery: Is There More to Equal Protection than State Action?*, 53 N.C.L. REV. — (1975).

53. *See* Henkin, *supra* note 52, at 487.

had other easily attainable outlets), and freedom of the press in *CBS*. Property rights of an almost chauvinistically private club prevailed over an equal protection challenge in *Moose Lodge*, but not in *Burton*, where the property rights of a public restaurant carried far less weight.[54]

Viewed in this light, *Jackson* may be less important for its state action analysis than for its insight into the majority's feelings about the right to a hearing prior to a discontinuance of utility services for nonpayment.[55] It seems unlikely, however, that the Court would have considered an erroneous termination of electrical service in isolation to be an insignificant matter.[56] More likely, the Court was also concerned with the administrative difficulties and expense that a large number of generally unmeritorious disputes could generate for the utilities if a hearing were required in each case.[57] Moreover, the utilities find termination notices to be useful bill collecting devices,[58] the effectiveness of which could be weakened by a hearing requirement. Whether *Jackson* reflects a concern that erroneous terminations are too infrequent[59] to warrant due process protection or that the procedures required to prevent them would be too unwieldly, the Supreme Court's analysis in past state action cases implies that at the foundation of *Jackson* lay an inarticulated premise that the rights of utility customers to a timely termination hearing are insufficient to override the private property interests of the public utility owners.

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54. *See* Note, 60 VA. L. REV., *supra* note 20, at 850.

55. *See generally* Note, 53 N.C.L. REV., *supra* note 52.

56. The need for procedural safeguards prior to such a termination is ostensibly to prevent erroneous terminations. The right of a utility to discontinue service for actual, undisputed nonpayment has not been challenged. Erroneous or not, however, it cannot be denied that a utility termination is a serious and potentially dangerous matter. This was underscored by the deaths of a couple in their nineties in upstate New York on Christmas Eve, 1973. They froze to death after their heat had been cut off for nonpayment of bills. *See* N.Y. Times, Dec. 28, 1973, at 25 col. 1.

57. Justice Marshall answered this concern by reminding the majority that a full-scale, formal hearing need not be required to satisfy due process standards, but that abbreviated procedures could suffice. *See* 95 S. Ct. at 464-65 (Marshall, J., dissenting).

58. In 1973 Consolidated Edison (serving the State of New York) delivered about 2.8 million disconnect notices while only about 102,000 residences were actually terminated. *See* N.Y. Times, Jan. 24, 1974, at 20 col. 4. The State Public Service Commissioner was also quoted as saying, "The disconnect notice is an effective collection tool which is necessary for the financial viability of the utilities." *Id.*

59. One recent survey indicated that out of a seventeen-city area, serving about 19 million utility customers, there were 310,000 terminations for nonpayment in the space of one year, or roughly 1.5%. There was no indication, however, how many of these terminations were discovered to be erroneous. *See* Comment, *The Shutoff of Utility Services for Nonpayment: A Plight of the Poor*, 46 WASH. L. REV. 745, 777 (1971). *But see* note 92 *infra*.

Of course, such property interests would not be a factor, nor would there be a preliminary state action inquiry, if the utility under attack were municipally owned. There would, however, still be one threshold question to be answered before the elements of due process could be considered: whether there is a "property" interest in utility service protected by the due process clause of the fourteenth amendment.

UTILITY SERVICE AS A "PROPERTY" INTEREST

Paralleling the recent expansion in the areas to which the state-action concept has been applied[60] has been an expansion in the range of liberty and property interests held to be protected by the fourteenth amendment from deprivation without due process of law.[61] Generally, the cases have required some sort of vested interest or expectancy in the alleged right.[62] The "interest or expectancy" must be more than a mere subjective expectancy, however.[63] It must at least be rooted in an informal, mutual understanding or agreement,[64] or, if not, in a formal statute or set of rules.[65] It is clear that the independent source of an "interest or expectancy" need not be the Constitution itself.[66]

Under these judicially defined tests, there are two avenues by which utility services may qualify as protected property interests. The more tenuous of these would be based upon an informal expectancy, rooted in the essential nature of these services, and the fact that virtually everyone not only receives them, but takes them for granted as

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60. *See* cases cited note 19 *supra.*

61. *See* Goss v. Lopez, 95 S. Ct. 729 (1975) (public school education); Fusari v. Steinberg, 95 S. Ct. 533 (1975) (unemployment compensation benefits); Wolff v. McDonnell, 418 U.S. 539 (1974) ("good time" sentence reductions); Department of Agriculture v. Murry, 413 U.S. 508 (1973) (food stamps); Perry v. Sindermann, 408 U.S. 593 (1972) (employment in state university system); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973); Burr v. New Rochelle Mun. Housing Authority, 479 F.2d 1165 (2d Cir. 1973) (rent increases). *But see* Arnett v. Kennedy, 416 U.S. 134 (1974) (federal civil service employment); Board of Regents v. Roth, 408 U.S. 564 (1972) (employment in state university system).

62. *Compare* Board of Regents v. Roth, 408 U.S. 564 (1972), *with* Perry v. Sindermann, 408 U.S. 593 (1972).

63. *See* Perry v. Sindermann, 408 U.S. 593, 603 (1972).

64. *Id.* at 601.

65. *See* Goss v. Lopez, 95 S. Ct. 729, 735 (1975); Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973).

66. Goss v. Lopez, 95 S. Ct. 729, 735 (1975); *cf.* Wolff v. McDonnell, 418 U.S. 539 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972).

a modern necessity.[67] It may not be necessary, however, to rely on an informal expectancy if there is a statutory requirement that all utilities in a state provide reasonably continous service.[68] In this situation, utility customers apparently would have a property right under state law that could not be divested without satisfaction of some minimal elements of due process.[69]

While the *nature* of a property interest is relevant to determining whether due process applies, the *importance* of the alleged deprivation is crucial to the form that due process will take in a particular case.[70] The interest of a person in avoiding a property deprivation must be balanced against the government's interest in summary disposition of disputed claims.[71] Thus, while as a general proposition some form of prior notice and hearing will be required as long as a deprived property right is not *de minimis*, when prompt action is necessary to protect an important public interest, even substantive rights in private property can be abrogated summarily.[72] Similarly, it would appear that entitlements to property not substantively protected by the due process clause, but still subject to procedural protection,[73] can be deprived without prior procedural safeguards if the public interest predominates.[74]

It should be emphasized, however, that even when this balancing process weighs in favor of prior procedural safeguards, it does not nec-

67. "Although such items as a stove, a stereophonic phonograph, a table and a bed are 'deserving of due process protection,' 'the requirements of due process should be more embracing' when an absolute necessity of modern life such as electricity is involved." Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 669 (7th Cir. 1972) (en banc) (Sprecher, J., dissenting) (citations omitted).

68. *See* note 8 *supra.*

69. In Goss v. Lopez, 95 S. Ct. 729, 735-36 (1975), a state statute providing for mandatory public school education formed the basis of the Supreme Court's decision, holding that students could not be suspended from school for a period of ten days or less without prior procedural safeguards.

70. "[A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process." Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

71. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

72. *See* Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972). Cases where circumstances have justified summary procedures include: Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (protect public from misbranded drugs); United States v. Pfitsch, 256 U.S. 547 (1921) (meet needs of war effort); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (contaminated foods).

73. *E.g.*, Goss v. Lopez, 95 S. Ct. 729, 735 (1975) (public education); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits).

74. *Cf.* Goss v. Lopez, 95 S. Ct. 729, 740-41 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974).

essarily follow that a full evidentiary hearing will be required. Due process may be satisfied with very abbreviated procedural safeguards.[75] Factors that have influenced the extensiveness of required prior procedures are the seriousness of the deprivation,[76] the length of the deprivation,[77] the nature and extent of available subsequent proceedings,[78] and the existence of special interests of the state in abbreviated procedures.[79] Irrespective of these factors, however, it is elementary to any form of due process that there be a timely and adequate notice of the proposed deprivation and an opportunity to be heard "at a meaningful time and in a meaningful manner."[80]

In *Goldberg v. Kelly*[81] the Court faced a procedure to terminate public assistance payments that consisted solely of a post-termination hearing. No personal appearance by the person to be terminated, no oral presentation of evidence, and no confrontation of adverse witnesses was required prior to the discontinuance of payments. Crucial to the Court's decision, finding this procedure inadequate, was a recognition that a welfare termination pending a later resolution may deprive an *eligible* welfare recipient of "the very means by which to live while he waits."[82] The Court noted, however, that a formal trial need not be provided at the pretermination stage; the hearing would have only to provide an initial determination of welfare eligibility to protect against erroneous termination.[83] The fatal flaw in the post-termination procedure was that it failed to provide an opportunity for the welfare recipient to present oral evidence before an impartial decision-maker, or to confront and cross-examine adverse witnesses *prior* to the termi-

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75. *See* Goss v. Lopez, 95 S. Ct. 729 (1975).

76. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (loss of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (loss of welfare benefits); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishment of wages). *Compare* Wolff v. McDonnell, 418 U.S. 539 (1974), *with* Morrissey v. Brewer, 408 U.S. 471 (1972).

77. *See, e.g.*, Goss v. Lopez, 95 S. Ct. 729 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

78. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974). *Compare* North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975), *with* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

79. *See* Wolff v. McDonnell, 418 U.S. 539, 561-63 (1974).

80. Fuentes v. Shevin, 407 U.S. 67, 80 (1972). *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." Fuentes v. Shevin, *supra* at 81.

81. 397 U.S. 254 (1970).

82. *Id.* at 264.

83. *Id.* at 266-67.

nation.[84] While no particular order of proof or mode of presenting evidence was required by the Court, the neutral arbiter's decision had to rest solely on the legal rules and evidence presented at the hearing, and he was required to state the reasons for his decision, and the evidence relied on.[85]

At the opposite end of the informal due process spectrum is *Goss v. Lopez*,[86] a case involving a ten-day suspension of students from a public school. Only a post-suspension hearing was provided for by school procedures. The Supreme Court stated that "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved."[87] In this case, a mistaken exclusion from the educational process had to be balanced against the need for discipline in the public schools. Limiting its opinion to cases involving suspensions of ten days or less, the Court required that prior to suspension a student be given an oral or written notice of charges, an explanation of the evidence against him, and a chance to tell his side of the story.[88] However, this abbreviated "hearing" would follow immediately after the notice, and would, in effect, be little more than an informal discussion in the principal's office. None of the formalities of *Goldberg* were required, in recognition of the large number of short suspensions and of the administrative burdens that more formal requirements would impose upon public schools.[89]

Electrical service is a vital need in today's society to the comfort, if not livability, of the modern home. Its loss surely can be considered as serious a deprivation as the loss of one's driver's license,[90] or a few days of public school education, or perhaps even a temporary deprivation of welfare benefits.[91] At a very minimum, therefore, an individual should be afforded an adequate notice prior to termination and an opportunity personally to dispute any amounts claimed to be due. Using prior informal due process cases as a guide, standards can be postulated for adequate and meaningful notice and hearing.

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84. *Id.* at 268-271.
85. *Id.* at 271.
86. 95 S. Ct. 729 (1975).
87. *Id.* at 738-39.
88. *Id.* at 740.
89. Cases involving suspensions of longer than ten days would presumably require more formal proceedings, since the deprivation to the student would be more serious. *Id.* at 741.
90. *See* Bell v. Burson, 402 U.S. 535 (1971).
91. *See* Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 447 (S.D.N.Y. 1972).

"Adequate" notice must be received sufficiently in advance of a termination to enable a consumer to forestall such termination by either paying his bill or notifying the company if it is in error.[92] In *Goldberg*, the Supreme Court did not find New York's seven-day notice to be insufficient per se, but it intimated that fairness may sometimes dictate a longer period.[93] Notice must also be more than a bare statement threatening a termination in a matter of days or weeks if payment is not made. In addition to reasons for the proposed termination, there should be a notification that if there is a dispute, recourse may be had to either company officials or the Public Utility Commission.[94]

Where the resolution of a disputed claim depends upon findings of fact, especially with respect to credibility, an opportunity to present oral evidence is a necessary component of due process.[95] At a minimum, a pre-termination hearing[96] should be designed to establish the "probable validity"[97] of a utility's entitlement to a disputed amount. Although such a hearing may be informal, cases establish that an impartial decision-maker,[98] such as a member of the State Public Utility Commission, should be provided, and that the reasons for his determination, as well as the evidence relied upon, should be specified.[99]

Goldberg strongly supported a right to confrontation and cross-

92. Utility Company error in terminating service is not insignificant. As many as 16% of the complaints investigated by the New York Public Service Commission result in adjustments in favor of the consumer. *Id.* at 448 n.11.

93. 397 U.S. at 268.

94. *See* Palmer v. Columbia Gas, Inc., 479 F.2d 153, 166 (6th Cir. 1973); Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 450 (S.D.N.Y. 1972).

95. *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970); *cf.* Burr v. New Rochelle Mun. Housing Authority, 479 F.2d 1165, 1169 (2d Cir. 1973).

96. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), due process was found not to require a hearing before issuance of a writ of seizure for certain household goods. That case is distinguishable from *Jackson*, however, in that the same statute that authorized the issuance of the writ also mandated a timely hearing subsequent to the seizure. Thus the length of time of a potentially erroneous property deprivation was greatly limited. *See* text accompanying notes 76-79 *supra*. In contrast, the applicable statute in *Jackson* gives the Public Utilities Commission complete discretion in refusing to grant a hearing if, in the Commission's opinion, it would not be in the public interest. *See* PA. STAT. ANN. tit. 66, § 1393 (1959). *Jackson* is further distinguishable in that it involved an extremely serious property deprivation, while *Mitchell* involved the deprivation of such arguably non-essential items as a stereo and a refrigerator. *Compare* Mitchell v. W.T. Grant Co., *supra*, *with* North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975).

97. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974); Morrissey v. Brewer, 408 U.S. 471, 485 (1972); Bell v. Burson, 402 U.S. 535, 540 (1971); Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

98. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970); *cf.* Fusari v. Steinberg, 95 S. Ct. 533, 538 (1975).

99. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

examination in the welfare context, but a more recent case casts some doubt on the indispensability of that requirement. In *Fusari v. Steinberg*[100] the Court remanded a case partly for consideration of whether a requirement that examiners base their decisions on eligibility for unemployment compensation benefits only on evidence submitted in person or in writing might ameliorate the absence of a confrontation requirement.[101] Perhaps an accommodation can be reached whereby a confrontation requirement would be imposed in cases where, for example, credibility is an important issue to be determined.

CONCLUSION

Jackson v. Metropolitan Edison casts serious doubt on whether constitutional proscriptions are likely to be imposed on privately owned utility companies in the near future. Apparently the Court felt that the need to preserve private decision-making in the use of one's property was a worthier consideration in the private utility context than providing a customer with a hearing prior to a service termination. The Supreme Court has yet to rule on a similar case involving a governmentally owned utility, but prior, analogous cases strongly suggest that the almost universal necessity of electricity and the hardships that its deprivation would cause would carry the day for some informal prior procedures to prevent the erroneous termination that one court has termed an "Orwellian nightmare of computer control."[102]

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100. 95 S. Ct. 533 (1975).
101. *Id.* at 538.
102. *See* Bronson v. Consolidated Edison Co., 350 F. Supp. 443, 444 (S.D.N.Y. 1972).